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No. 99-998

In the Supreme Court of the United States

NANCY LYNNE MOYER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the evidence that petitioner tampered with and stole some of a hospital's supply of prescription medication, which had to be replenished with out-of-state supplies, satisfied the interstate commerce element of 18 U.S.C. 1365(a), which prohibits "tamper[ing] with any consumer product that affects interstate * * * commerce."

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A6-A13) is reported at 182 F.3d 1018. The opinion of the district court (Pet. App. A1-A5) is reported at 985 F. Supp. 924.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1999. A petition for rehearing was denied on September 15, 1999 (Pet. App. A14). The petition for a writ of certiorari was filed on December 13, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on four counts of tampering with a consumer product that affects interstate commerce, in violation of 18 U.S.C. 1365(a)(4); and on six counts of obtaining a controlled substance through fraud, in violation of 21 U.S.C. 843(a)(3). She was sentenced to 70 months' imprisonment, to be followed by three years of supervised release. Pet. App. A6-A13.

1. Petitioner was a physician in the intensive care unit of Methodist Hospital in St. Louis Park, Minnesota. In January 1997, she tampered with and impeded the delivery of morphine to hospital patients by using a needle and syringe to remove morphine from patients' intravenous (IV) bags, and then replacing it with an equal volume of saline solution. Petitioner tampered with six IV bags before she was caught. In two instances, the IV bags began to leak and had to be replaced with new bags from the hospital pharmacy. In another instance, the bag was removed and the morphine continued to be administered through direct injections. Pet. App. A6-A7; Gov't C.A. Br. 2-5. Complementary sedatives, known as benzodiazepines, were also used as necessary to control patients' agitation resulting from the decrease in their morphine intake, which, in turn, was caused by petitioner's tampering. Pet. App. A5.

When its supplies dropped below a predetermined level, Methodist Hospital ordered and received morphine and benzodiazepines from an in-state supplier that purchased those products from an out-of-state source. The hospital ordered additional morphine on January 14, 1997, shortly after petitioner committed

four of her six acts of tampering. Pet. App. A9; Gov't C.A. Br. 22, 24-26.

2. The district court denied petitioner's post-trial motion for a judgment of acquittal on the product-tampering counts, rejecting her argument that the evidence was insufficient to show that her product tampering affected interstate commerce. Pet. App. A1-A5. The court concluded that, based on the evidence at trial, the jury was entitled to find that "the morphine had not yet reached its end user and was still in the stream of commerce." *Id.* at A5. The court also concluded that "[b]ecause these [benzodiazepines] came to Methodist Hospital from out-of-state suppliers, a reasonable jury could find that [petitioner's] tampering affected interstate commerce." *Ibid.* The court accordingly ruled that the evidence was sufficient to sustain petitioner's product-tampering convictions.

3. The court of appeals affirmed. Pet. App. A6-A13. It held that "there was sufficient evidence from which a reasonable jury could find that [petitioner's] tampering with her patients' IV units had an effect on interstate commerce." *Id.* at A9. The court explained that "a reasonable jury could find that [petitioner's] illicit use of her patients' morphine contributed to the depletion of the hospital's morphine supply, which in turn required the hospital to order additional morphine" that "necessarily traveled to Minnesota from out-of-state manufacturers." *Id.* at A9-A10.

The court rejected petitioner's argument that her use of the morphine had no effect on interstate commerce because the same amount would have been used whether she or the patients consumed it. Pet. App. A10. The court held that whether "the patients' use of the morphine would have resulted in the very same depletion of the hospital's supply" was "irrelevant"

because petitioner "stole the morphine from her patients before they could use it themselves, and the reduction in supply was thus a result of her actions and not theirs." *Ibid.* Thus, the court concluded that "[t]he subsequent effect on interstate commerce * * * was, as a matter of fact, a result of [petitioner's] theft of the morphine from her patients' IV units." *Ibid.*[1]

ARGUMENT

Petitioner contends that her product-tampering convictions should be reversed because the government failed to establish a sufficient link between her crimes and interstate commerce. That argument is without merit.

1. The product-tampering statute, 18 U.S.C. 1365(a), makes it a federal crime for any person, "with reckless disregard for the risk that another person will be placed in danger of death or bodily injury and under circumstances manifesting extreme indifference to such risk," to "tamper[] with any consumer product that affects interstate or foreign commerce." That broad jurisdictional language demonstrates Congress's intent to use the full breadth of its power under the Commerce Clause of the Constitution to punish any form of product tampering that interferes with interstate commerce. See *Allied-Bruce Terminix Cos.* v. *Dobson*, 513 U.S. 265, 273 (1995) ("That phrase—'affecting

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[1] The court of appeals also rejected petitioner's claims that the government was required to prove that she had acted with specific intent to harm her patients (Pet. App. A7-A8); that the evidence was insufficient to show that she had acted with reckless disregard of, and extreme indifference to, the risks to the health of her patients (*id.* at A10-A11); that the jury instructions were erroneous (*id.* at A12); and that her sentence was improper (*id.* at A12-A13). Petitioner does not renew those claims before this Court.

commerce'—normally signals Congress' intent to exercise its Commerce Clause powers to the full."). Petitioner contends (Pet. 9-18), however, that a conviction under the product-tampering statute requires proof of a "substantial" connection to interstate commerce for each individual act of tampering, and asserts that her convictions should be set aside for want of such proof. Petitioner is incorrect.

a. This Court has long recognized Congress's authority to protect consumers of prescription drugs by regulating such drugs "from the moment of their introduction into interstate commerce all the way to the moment of their delivery to the ultimate consumer." *United States* v. *Sullivan*, 332 U.S. 689, 696 (1948); see *McDermott* v. *Wisconsin*, 228 U.S. 115 (1913). In *Sullivan*, the Court held that Congress's power to prohibit the misbranding of prescription drugs that have moved in interstate commerce includes the power to prohibit misbranding by individuals who received such drugs through intrastate sales and shipments. 332 U.S. at 698 (noting that "while the petitioner had received the sulfathiazole by way of an intrastate sale and shipment, he bought it from a wholesaler who had received it as the direct consignee of an interstate shipment."). As *Sullivan* recognized, Congress's authority to regulate and protect a national market includes the power to regulate intrastate activity linked to and affecting that market. See *id.* at 696-698. *Sullivan* did not limit that authority to the regulation of discrete acts that themselves have a "substantial" effect on interstate commerce.

Sullivan controls here. Just as the statutory provision at issue in that case permissibly covered "every article that had gone through interstate commerce until it finally reached the ultimate consumer," 332 U.S. at

697, the product-tampering statute permissibly covers tampering with a consumer product that affects interstate commerce, at any time before the product reaches its final user. The evidence introduced in this case established that the consumer product at issue—the morphine being administered to patients—was still in the stream of commerce when petitioner tampered with it. See Pet. App. A5, A9-A10. The evidence showed that the morphine stolen by petitioner was in locked cassettes attached to the patients' IV lines, and had not yet entered the tubing through which it would be delivered to the patients. Although the cassettes were at the patients' bedsides, the morphine remained in the possession and under the control of petitioner and the hospital staff. See *id.* at A5; Gov't C.A. Br. 21-23.[2] And petitioner's illicit use of the morphine contributed to the depletion of the hospital's morphine supply, thus requiring that it be restored with out-of-state supplies. That impact on interstate commerce occurred directly as a result of petitioner's tampering. See Pet. App. A9-A10.[3] Under *Sullivan*, such a connection to interstate

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[2] There is no merit in petitioner's claim (Pet. 11-12) that the morphine had been irrevocably removed from the stream of commerce at the time she tampered with it. As *Sullivan* explained, a product remains in commerce until it reaches its "ultimate consumer." 332 U.S. at 696. Petitioner cites no authority for the proposition that a product's particular location in the stream of commerce can diminish the fact that it is in commerce.

[3] Contrary to petitioner's assertions (Pet. 12), the court of appeals' decision does not conflict with *United States* v. *Levine*, 41 F.3d 607 (10th Cir. 1994), or *United States* v. *Johnston*, 42 F.3d 1328 (10th Cir. 1994). Those decisions hold that 18 U.S.C. 1365(b) requires proof of an effect on interstate commerce either at the time of, or subsequent to, the product-tainting at issue. As described above, the government introduced sufficient evidence at

commerce is sufficient to warrant congressional regulation under the Commerce Clause; proof that petitioner's crimes had a "substantial" effect on interstate commerce is unnecessary.

b. Contrary to petitioner's contentions (Pet. 12-18), the court of appeals' decision in this case is entirely consistent with this Court's decision in *United States* v. *Lopez*, 514 U.S. 549 (1995). In *Lopez*, the Court recognized "three broad categories of activity that Congress may regulate under its commerce power":

> First, Congress may regulate the use of the channels of interstate commerce. * * * * Second, Congress is empowered to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities. * * * * Finally, Congress' commerce authority includes the power to regulate those activities having a substantial relation to interstate commerce.

Id. at 558-559. In that case, the Court held that in enacting the Gun-Free School Zones Act of 1990, 18 U.S.C. 922(q), Congress had exceeded its authority to pass legislation falling under the third category identified above. Section 922(q) criminalized gun possession in the vicinity of schools, and did not require proof that each instance of gun possession bore some connection to interstate commerce. The Court emphasized that Section 922(q) "by its terms ha[d] nothing to do with 'commerce'" and "contain[ed] no jurisdictional element which would ensure, through

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trial for a reasonable jury to find that petitioner's conduct had such an effect.

case-by-case inquiry, that the [criminal act] in question affect[ed] interstate commerce." *Lopez*, 514 U.S. at 561.

In contrast, the product-tampering statute is directed at interference with commercial activity: it prohibits tampering with consumer products, including the provision of such products to consumers. The statute contains an express jurisdictional element requiring that the class of consumer products at issue "affect[] interstate or foreign commerce." 18 U.S.C. 1365(a). The statute's reach is thus limited to "a discrete set" of acts of product tampering that "have an explicit connection with or effect on interstate commerce." *Lopez*, 514 U.S. at 562. Thus, Section 1365(a), like the statutory provision at issue in *Sullivan*, is directed at activities linked to, and affecting, an interstate market. Just as *Sullivan* authorized the prohibition of certain kinds of interference with intrastate commercial activity because of the link to a national market, the court of appeals in this case properly upheld the application of Section 1365(a) to petitioner's conduct.[4]

The requirement of a "substantial" effect on interstate commerce does not mean that each individual instance of petitioner's conduct must have had a

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[4] Application of the product-tampering statute in this case may also be a permissible exercise of congressional power under the second category identified in *Lopez*, namely the power "to regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities." 514 U.S. at 558. The morphine with which petitioner tampered had moved in interstate commerce, and was still in the stream of commerce when she tampered with it since it had not yet reached its "ultimate consumer." *Sullivan*, 332 U.S. at 697. Congressional protection of that morphine may therefore constitute an exercise of Congress's power to protect "things in interstate commerce."

substantial impact. Rather, the aggregate effects of the regulated activity—tampering with consumer products—may be considered in determining whether the statute falls within the reach of Congress's commerce power. As the Court in *Lopez* confirmed, "where a general regulatory statute bears a substantial relation to commerce, the *de minimis* character of individual instances arising under that statute is of no consequence." 514 U.S. at 558 (emphasis omitted) (quoting *Maryland* v. *Wirtz*, 392 U.S. 183, 197 n.27 (1968)). Here, the product-tampering statute's application to petitioner's conduct is valid under that aggregation principle. The distribution of consumer products necessarily involves commercial activity;[5] in the aggregate, tampering with consumer products that have moved in interstate commerce unquestionably has a substantial effect on interstate commerce.

2. The petition in this case need not be held pending this Court's decision in *United States* v. *Morrison*, No. 99-5, and *Brzonkala* v. *Morrison*, No. 99-29 (argued Jan. 11, 2000). Those consolidated cases present the question, *inter alia*, whether 42 U.S.C. 13981, which creates a private right of action for victims of gender-motivated violence, is a permissible exercise of Congress's power under the Commerce Clause. Those

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[5] Petitioner's claim (Pet. 21) that her offenses involved nothing more than "purely local, non-economic activity" is unfounded. First, petitioner's acts of tampering occurred in a place of business—a hospital—and involved a product in the stream of commerce. Second, the relationship between petitioner and the patients whose morphine she tampered with and stole, as well as the relationship between the hospital and the patients, was commercial in nature: petitioner and the hospital supplied medical services to the patients, including the prescription and dispensation of appropriate medication.

cases involve the exercise of Congress's power to regulate non-economic violent conduct that affects interstate commerce. The instant case, however, concerns Congress's recognized authority to regulate a national market, including its power to prohibit conduct that interfers with commercial activity in that market. Moreover, unlike Section 1365(a) at issue here, Section 13981 does not contain an express jurisdictional element that ensures, through a case-by-case inquiry, that the regulated conduct affects interstate commerce.

Nor need the petition be held pending this Court's decision in *Jones* v. *United States*, No. 99-5739 (to be argued Mar. 21, 2000). That case involves the question whether 18 U.S.C. 844(i), which prohibits arson of a building, vehicle, or other property "used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce," was properly applied to a residence supplied with natural gas in interstate commerce, mortgaged to an out-of-state lender, and insured by an out-of-state insurer. Unlike the defendant in *Jones*, petitioner interfered with an interstate market by diverting a commercial product still in the stream of commerce to her own use.

For the same reason, there is no merit in petitioner's claim (Pet. 18-20) that the court of appeals' decision conflicts with decisions of the Third, Sixth, Ninth, and Eleventh Circuits. Like *Jones*, each of those decisions involves an application of the arson statute, not the product-tampering statute. See *United States* v. *McGuire*, 178 F.3d 203, 212 (3d Cir. 1999) (holding evidence insufficient to show effect on interstate commerce in prosecution under 18 U.S.C. 844(i) involving bombing of vehicle); *United States* v. *Latouf*, 132 F.3d 320, 327 (6th Cir. 1996), cert. denied, 523 U.S. 1086 (1998) (holding evidence sufficient to establish effect on

interstate commerce in prosecution under Section 844(i) involving arson of restaurant); *United States* v. *Denalli*, 73 F.3d 328, 330-331 (11th Cir.) (per curiam), modified on other grounds, 90 F.3d 444 (1996) (holding evidence insufficient to establish effect on interstate commerce in prosecution under Section 844(i) involving arson of private residence); *United States* v. *Pappadopoulos*, 64 F.3d 522, 527-528 (9th Cir. 1995) (holding evidence insufficient to establish effect on interstate commerce in prosecution under Section 844(i) involving arson of private restaurant). This Court will have occassion in *Jones* to address issues related to those decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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